

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

WAFFLE HOUSE, INC.

Petitioner,

v.

Case No. 16-60077

**NATIONAL LABOR RELATIONS
BOARD,**

Respondent.

**PETITIONER’S REPLY TO RESPONDENT’S OPPOSITION TO THE
MOTION FOR SUMMARY REVERSAL**

TO: THE HONORABLE JUSTICES OF THE FIFTH CIRCUIT COURT OF
APPEALS:

Petitioner Waffle House, Inc. (“Petitioner”) respectfully files this Reply to Respondent National Labor Relations Board’s (the “NLRB”) July 13, 2016 Opposition to Petitioner’s July 11, 2016 Motion for Summary Reversal (the “Response”). Petitioner seeks summary reversal of the NLRB’s February 1, 2016 Order (the “Order”) that Petitioner violated Section 8(a)(1) of the National Labor Relations Act (the “NLRA”) by maintaining an arbitration agreement with a class and collective action waiver. The NLRB’s Order undisputedly contradicts binding Fifth Circuit precedent that holds class and collective action waivers do not violate

the NLRA and must be enforced under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*¹

I.

The NLRB's Response does not address the substance of Petitioner's Motion for Summary Reversal. The NLRB does not contest that, under the law of this Circuit, *D.R. Horton* and *Murphy Oil* require reversal of the NLRB's Order until there has been a change in law. *See Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court."). Because there has been no "intervening change in the law" since *D.R. Horton* and *Murphy Oil*, reversal of the Order is inevitable, and summary reversal is appropriate.

II.

Instead, the NLRB argues that summary reversal is not warranted because *one day* there may be a change in the law. *See* Response at p. 3-4. The NLRB takes the position that this Court should delay ruling on Petitioner's Motion for

¹ *See D.R. Horton v. NLRB*, 737 F.3d 344, 355-64 (5th Cir. 2013), *petition for reh'g en banc denied*, Case No. 12-60031 (5th Cir. Apr. 16, 2014); *see also Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015), *petition for reh'g en banc denied*, Case No. 14-60800 (5th Cir. May 13, 2016); *Chesapeake Energy Corp. v. NLRB*, 633 F. App'x 613, 614-15 (5th Cir. 2016).

Summary Reversal because: (1) the NLRB *may* file a petition for writ of certiorari with the U.S. Supreme Court in *another matter*; (2) the U.S. Supreme Court *may* accept certiorari in that *other matter*; and (3) in the event certiorari is sought and accepted, the law affecting Petitioner's Motion for Summary Reversal *may* change. *See* Response at p. 3-4. The NLRB's position is untenable.

A party simply does not have the luxury of delaying a matter in the hopes that its legal position will strengthen in the interim. This is especially true where, as here, the law controlling Petitioner's Petition for Review and its Motion for Summary Reversal is well-settled in this Circuit *and* the NLRB had the opportunity to seek certiorari in *D.R. Horton*, but chose not to.

The appropriate procedural mechanism here is not to delay ruling on the Motion for Summary Reversal based on the NLRB's hypothetical scenario coming to fruition. Rather, the appropriate procedural course is for the NLRB to file a petition for certiorari in *this matter*, once the NLRB's Order is reversed (should it desire to do so).

Moreover, since Petitioner filed its Motion for Summary Reversal, this Court has once again granted another party's request for summary disposition on the exact same issue (as the NLRB noted in its Response). *See Mastec Servs. Co. v. NLRB*, Case No. 16-60011 (5th Cir. July 11, 2016).

IV.

Simply put, Petitioner is entitled to the summary reversal it seeks from this Court. *See Ayo v. Triplex, Inc.*, 457 F. App'x 382, 385 (5th Cir. 2012) (“[T]he ‘primary purpose’ of the Federal Rules of Appellate Procedure is ‘the securing of speedy and inexpensive justice in a uniform and well ordered manner.’”) (quoting *Hernandez v. Thaler*, 630 F.3d 420, 425 (5th Cir. 2011)). In accordance with this Circuit’s precedent, reversal of the NLRB’s Order is appropriate.

Respectfully submitted, this 14th day of July, 2016.

s/ Daniel E. Turner

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CERTIFICATE OF SERVICE

I certify that on July 14, 2016, the foregoing **Petitioner's Reply to Respondent's Opposition to the Motion for Summary Reversal** was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which system will serve notice of the same on all parties or their counsel of record.

s/ Daniel E. Turner
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